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Public Prosecutor v Ishak bin Basri

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HIGH COURT (GEORGETOWN) — CRIMINAL APPLICATION NO PA-44–27–05 OF 2019
AKHTAR TAHIR J
24 SEPTEMBER 2019

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Criminal Procedure — Criminal Procedure — Petition of appeal — Applicant filed notice of motion to reinstate appeal and to file amended petition of appeal — Whether notice of motion contained defects — Whether affidavit in support contained errors — Whether appeal premature

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The public prosecutor ('applicant') filed a notice of motion on 9 May 2019 seeking the High Court to: (a) reinstate their appeal that was struck off; (b) to allow the applicant to file an amended petition of appeal; and (c) also to allow the applicant to file the said petition of appeal which was time barred.

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Held, striking out the notice of motion:

(1) The first prayer in the notice of motion contained a major defect whereby upon inspection of the court's records, Case Nos PA-44LB-19–04 of 2019 and PA-44LB-20–04 of 2019 which were the notice of motion to amend the petition of appeal and to file the petition of appeal were non-existent. The error in stating the case number which the applicant sought to reinstate was a mistake that would affect the whole notice of motion as it was specifically making reference to a case where the applicant sought to reinstate. The applicant had not even made an application to amend the notice of motion which was outright erroneous (see paras 8–11).

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(2) The affidavit in support also contained multiple errors which was puzzling and caused confusion to all parties including the court. Affidavits made in support to a notice of motion or a notice of application must be precise and contain exact particulars. As for criminal cases, the same principle was applied where an erroneous affidavit could be cured by a supplementary affidavit. However, the applicant had not filed any supplementary affidavit to cure the errors in the affidavit in support (see paras 12, 17 & 20).

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(3) The notice of appeal itself was also erroneous as it stated that this court had dismissed the application of the public prosecutor to reinstate and relist the applicant's appeal. The notice of motion was not dismissed or denied but instead it was struck off due to the mentioned reasons. The

applicant had the liberty to file afresh a notice of motion in the High Court to reinstate their appeal. Therefore, the appeal itself was premature as the High Court was yet to be functus officio in regards to this case. In addition, striking out the notice of motion did not amount to a 'decision' and thus it made the appeal premature as this High Court had not finally disposed of the rights of the parties (see paras 21–22, 24 & 27).

[Bahasa Malaysia summary

Pendakwa raya ('pemohon') memfailkan notis usul pada 9 Mei 2019 memohon Mahkamah Tinggi untuk: (a) mengembalikan rayuan mereka yang dibatalkan; (b) untuk membenarkan pemohon memfailkan petisyen rayuan yang dipinda; dan (c) juga untuk membenarkan pemohon memfailkan petisyen rayuan tersebut yang luput had masa.

Diputuskan, membatalkan notis usul:

(1) Permohonan pertama dalam notis usul mengandungi kecacatan besar di mana setelah memeriksa rekod mahkamah, Kes No PA-44LB-19–04 Tahun 2019 dan PA-44LB-20–04 Tahun 2019 yang merupakan notis usul untuk meminda petisyen rayuan dan untuk memfailkan petisyen rayuan tidak wujud. Kesalahan dalam menyatakan nombor kes yang dipohon oleh pemohon untuk mengembalikannya adalah kesalahan yang akan mempengaruhi keseluruhan notis usul kerana secara khusus merujuk kepada kes di mana pemohon berusaha untuk mengembalikannya. Pemohon bahkan belum membuat permohonan untuk meminda notis usul yang benar-benar salah (lihat perenggan 8–11).

(2) Afidavit sokongan juga mengandungi banyak kesalahan yang membingungkan dan menimbulkan kekeliruan kepada semua pihak termasuk mahkamah. Afidavit yang dibuat untuk menyokong notis usul atau notis permohonan mestilah tepat dan mengandungi butir-butir yang tepat. Bagi kes jenayah, prinsip yang sama diterapkan di mana afidavit yang salah dapat disembuhkan dengan afidavit tambahan. Walau bagaimanapun, pemohon belum mengemukakan afidavit tambahan untuk mengatasi kesalahan dalam afidavit sokongan (lihat perenggan 12, 17 & 20).

(3) Notis rayuan itu sendiri juga salah kerana menyatakan bahawa mahkamah ini telah menolak permohonan pendakwa raya untuk mengembalikan dan mengadili rayuan pemohon. Notis usul tidak ditolak tetapi sebaliknya dibatalkan kerana alasan yang dinyatakan. Pemohon mempunyai kebebasan untuk memfailkan semula notis usul di Mahkamah Tinggi untuk mengembalikan rayuan mereka. Oleh itu, rayuan itu sendiri terlalu awal kerana Mahkamah Tinggi belum lagi functus officio dalam kes ini. Di samping itu, pembatalan notis usul tidak

bermakna satu 'keputusan' dan dengan itu menjadikan rayuan terlalu awal kerana Mahkamah Tinggi ini tidak akhirnya melepaskan hak pihak-pihak (lihat perenggan 21–22, 24 & 27).]

Cases referred to

British American Life & General Insurance Bhd v Pembinaan Fal Bhd & Ors [1994] 3 MLJ 267; [1994] 4 CLJ 652, HC (refd)
Chandler v Alberta Association of Architects [1989] 2 SCR 848, SC (refd)
Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585; [2010] 9 CLJ 625, FC (refd)
PP v Ng Wing Fau & Ors [2019] 1 MLJ 805; [2018] 9 CLJ 707, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50(1), (2)
Criminal Procedure Code ss 307, 307(4), (5), (6), 310

Nurliyana bt Md Zukri (Legal Department, Royal Malaysian Customs) for the applicant.
Respondent (representing himself).

Akhtar Tahir J:

BACKGROUND

[1] The applicant (the public prosecutor) in this case filed a notice of motion on 9 May 2019 seeking the High Court to: (1) reinstate their appeal that was struck off; (2) to allow the applicant to file an amended petition of appeal; and (3) also to allow the applicant to file the said petition of appeal which was time barred.

[2] After perusing the notice of motion and the affidavit in support which was affirmed by the learned deputy public prosecutor, this court made a decision to strike out the notice of motion.

THE LAW

[3] Section 307 of the Criminal Procedure Code ('the CPC') provides the requirement and procedure that must be followed when an Appeal is made to the High Court. Subsections (4) and (5) stipulates that a petition to the appeal made in the lower courts must be filed within a period of 14 days from the delivery of the grounds of judgment and the notes of proceedings.

[4] Furthermore, sub-s (6) states that a petition of appeal shall briefly state the substance of the judgment appealed against and details of points of law and facts which the trial court had allegedly erred. The provision states:

(6) Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

[5] The procedural requirements must be strictly followed and failure to follow the time frame provided would deem the appeal to be withdrawn by the party making the appeal.

[6] However, the High Court is granted discretionary powers by virtue of s 310 of the CPC to waive the requirements and formalities provided by s 307 of the CPC.

[7] Section 310 of the CPC provides:

310 Appeal specially allowed in certain cases

A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

THE DECISION

[8] After perusal of the notice of motion and the affidavit in support this court finds that the first prayer in the notice of motion contains a major defect whereby the first prayer seeks to reinstate the Appeal Case Number PA-41LB-07–03 of 2018 together with an addition two other notice of motions which are Case Numbers PA-44LB-19–04 of 2019 and PA-44LB-20–04 of 2019. The notice of motion, prayer number one states:

1. Penyenaraian semula kes rayuan jenayah PA-41LB-07–03/2018 bersama-sama permohonan meminda petisyen rayuan diluar masa melalui notis usul *PA-44LB-19–04/2019 and PA-44LB-20–04/2019 …*

[9] However, upon inspection of the court's records Case Number PA-41LB-07–03 of 2018 exist but Case Number PA-44LB-19–04 of 2019 and PA-44LB-20–04 of 2019 which are the notice of motion to amend the petition of appeal and to file the petition of appeal is non-existent.

[10] The error in stating the case number which the applicant seeks to reinstate is a mistake that would affect the whole notice of motion as it is specifically making reference to a case where the applicant seeks to reinstate.

[11] The applicant had not even made and application to amend the notice of motion which was outright erroneous. It must be remembered that an

applicant in making a motion to the High Court relies heavily on the contents of their notice of motion which is supposed to reflect the intent and purpose of the applicant.

[12] On another note, the affidavit in support also contained multiple errors which is puzzling and causes confusion to all parties including the court. The applicant in their notice of motion had prayed to reinstate their Appeal Case Number PA-41LB-07–03 of 2018.

[13] However, the affidavit in support affirmed by the learned deputy public stated on para (3) that the decision by the magistrate's court was made on 9 February 2019 and in the subsequent paragraph it was stated that the notice of appeal was filed on 19 February 2019 against the decision of the magistrate's court. Paragraphs (3) and (4) of the affidavit in support is reproduced in verbatim as below:

> 3. Saya sesungguhnya menyatakan bahawa kes ini telah dibicarakan di Mahkamah Majistret Bukit Mertajam, Pulau Pinang dengan nombor Pendaftaran PC-83-274–03/2017. Pada *09 Februari 2019,* Puan Majistret telah memutuskan Responden dilepaskan dan dibebaskan dari pertuduhan di bawah seksyen 135(1)(d) Akta Kastam 1967 di akhir kes pendakwaan.
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> 4. Ekoran daripada keputusan Puan Majistret tersebut, pihak Pemohon telah memfailkan Notis Rayuan pada *19 Februari 2018* (Lampiran A) dan Petisyen Rayuan pada 14 Mac 2019 (Lampiran B) dan rayuan ini telah diberikan nombor pendaftaran kes PA-41LB-7–03/2018 di Mahkamah Tinggi Pulau Pinang.

[14] This is quite confusing as to how did the magistrate's court had decided on the case on 9 February 2019 but the notice of appeal was filed earlier on 19 February 2018, which was close to a year earlier? This fact deposed by the applicant in their affidavit is somewhat perplexing.

[15] Furthermore, para (6) in the affidavit states that the applicant wishes to reinstate their Criminal Appeal Case Number PA-41LB-7–03 of 2019. Paragraph (6) of the affidavit states:

> 6. Saya sesungguhnya menyatakan bahawa Pihak Pemohon dengan rendah diri memohon agar Mahkamah Yang Mulia ini dapat menyenaraikan semula kes rayuan jenayah *PA-41LB-7–03/2019* yang telah dibatalkan di Mahkamah Tinggi (1) Georgetown pada 8 Mei 2019.

[16] Yet again the affidavit contained erroneous particulars of the case which the applicant had sought to reinstate. The accurate case number which ought to have been stated is PA-41LB-7–03 of 2018. Case Number PA-41LB-7–03 of 2019 did not exist in the court's records.

[17] This court wishes to reiterate the importance of ensuring that affidavits made in support to a notice of motion or a notice of application must be precise and contain exact particulars. Affidavits are declaration of facts made before a commissioner for oaths and because of its nature being on oath, it should be drafted with care and diligence to reflect accurately a matter that is to be affirmed.

[18] *Black's Law Dictionary* (2nd Ed) defines the term 'Affidavit' as:

> A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.

[19] In *British American Life & General Insurance Bhd v Pembinaan Fal Bhd & Ors* [1994] 3 MLJ 267; [1994] 4 CLJ 652, Richard Talalla J ruled that an erroneous affidavit can be cured by a supplemental affidavit in civil cases. In his grounds of judgment it was held:

> ... I do however agree that the defect in the original affidavit can be cured by a supplementary affidavit and in this regard the *Sandiland*'s case above stated is followed.

[20] As for criminal cases, this court is of the view the same principle is applied where an erroneous affidavit can be cured by a supplementary affidavit. Be that as it may, the applicant in this case had filed the affidavit on 9 May 2019 and up to the date of the hearing which was on 27 June 2019, the applicant had not filed any supplementary affidavit to cure the errors in the affidavit in support.

THE NOTICE OF APPEAL

[21] Another observation made by this court is in regards to the notice of appeal dated 10 July 2019 which is filed against this ruling. The notice of appeal itself is also erroneous as it states that this court had dismissed the application of the public prosecutor to reinstate and relist the applicant's appeal.

[22] To make things clear, the notice of motion was not dismissed or denied but instead it was struck off due to the abovementioned reasons. The applicant has the liberty to file afresh a notice of motion in the High Court to reinstate their appeal. The High Court is not 'functus officio' pertaining to the appeal.

[23] The doctrine of 'functus officio' was well elaborated by the Canadian Supreme Court in *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 where it was stated:

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St Nazaire Co* (1879) 12 Ch D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and;
2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd v JO Ross Engineering Corp* [1934] SCR 186.

Jowitt's Dictionary of English Law (2nd Ed 1977) defines functus officio as 'having discharged his duty'; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J in *Re VGM Holdings, Ltd* [1941] 3 All ER 417 (Ch D), is well summarized in the headnote:

Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

Black's Law Dictionary (5th Ed 1979) defines functus officio as 'a task performed':

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

The doctrine of functus officio states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No 292* (1964) 44 DLR (2d) 463 (BCSC)) 'To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine' (appellants' factum, at p 19).

[24] Therefore, the appeal itself is premature as the High Court is yet to be functus officio in regards to this case.

[25] In addition the term 'decision' has been defined under s 3 of the CJA 1964 as:

'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

[26] The term 'decision' is used by s 50(1) and (2) of the CJA 1964 which provides:

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision made by the High Court* —

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

(2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, *against any decision of the High Court* in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court by such appeal shall be confined to only question of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

[27] Thus, striking out the notice of motion does not amount to a 'decision' and thus it makes the appeal premature as this High Court has not finally dispose of the rights of the parties.

[28] In *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625 the Federal Court ruled:

(1) The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that, the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised as the party can always raise the issue during the appeal, if any, to be filed after the trial process is concluded. Therefore, the ruling of the trial court in this case was not a 'decision' as defined in s 3 of the CJA and it was not appealable (paras 24, 25 & 26).

[29] Subsequently, in *Public Prosecutor v Ng Wing Fau & Ors* [2019] 1 MLJ 805; [2018] 9 CLJ 707 which was recently decided by the Court of Appeal. The said case, the magistrate's court had acquitted and discharged the

respondents at the end of the defence's case. The public prosecutor then filed an appeal to the High Court.

[30] During the appeal in the High Court, the respondents could not be located and failed to turn up several times. Thus, the High Court had struck out the appeal on 8 September 2016. The public prosecutor then filed notice of motion for reinstatement of the appeals and for a stay of execution of the decision of the magistrate. The High Court dismissed the notice of motion. The public prosecutor then appealed the decision of the High Court in dismissing the notice of motion. The issue which arose in the Court of Appeal in this case was whether the present appeal (the appeal in the Court of Appeal) ought to be entertained on the ground that the public prosecutor did not possess the right of appeal from the order of the High Court.

[31] The Court of Appeal in their judgement made it clear that the decision of the High Court in 'dismissing' the notice of motion amounted to a decision as there was finality and the public prosecutor had no means to pursue the appeal any longer. It was also clarified that 'striking out' an appeal does not amount to a final order. The ground of judgment of the Court of Appeal stated:

> (1) In order to determine whether a decision is final, it is important to bear in mind that it is not merely the result of the decision that ought to be considered but also predominantly its effect. The order of the High Court dismissing the PP's application to relist the said appeals which were struck out earlier by another judge was not an interlocutory decision. This was at the appellate stage after the Magistrate had acquitted and discharged the respondents. The very nature of the dismissal of the notice of motion possessed an element of finality. Upon dismissing the notice of motion, the PP's appeal would become infructuous and the order of acquittal and discharge made by the Magistrate must therefore be regarded as final. Therefore, the decision dated 19 February 2017 was appealable to the Court of Appeal. The respondents' preliminary objection was thus dismissed (paras 12 & 14)
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> (2) The expression judgment' must necessarily mean a considered order on merits and not an order of dismissal for default. Therefore, functus officio under s 278 of the Criminal Procedure Code did not arise as the appeals were struck out merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court was competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to the law. Thus, the said appeals were to be remitted back to the High Court and be heard on its merits before another High Court Judge (paras 19 & 21)
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> [12] In our view, that in order to determine whether a decision is final, it is important to bear in mind that not merely the result of the decision be considered but also predominantly its effect. The order of the High Court dismissing the PP's application to relist Appeals No 41LB-03–02-2015 and No 410RS-01–02-3015

which were struck out earlier by another judge was not an interlocutory decision. It must be noted that this was at the appellate stage after the learned Magistrate had acquitted and discharged the respondents. *The very nature of the dismissal of the notice of motion possesses element of finality. Upon dismissing the notice of motion, the PP's appeal would become infructuous and the order of acquittal and discharge made by the learned Magistrate must therefore be regarded as final.* Therefore, the decision dated 19 February 2017 is appealable to the Court of Appeal.

[13] Another point to be noted is that an appeal by the PP pursuant to s 50(2) of the CJA 1964 must confine the appeal to questions of law only. The notice of appeal dated 24 February 2017 has formulated the question of law in respect of which this instant appeal is made.

[14] For the above reasons, we would dismiss the preliminary objection and the PP's appeal before us is to be proceeded with.

...

[19] Thus, by using the proper approach of analogy from the decided cases from other jurisdictions, the expression 'judgment' must necessarily mean a considered order on merits and not an order of dismissal for default. *Therefore, functus officio under s 278 of the Criminal Procedure Code does not arise as the appeals were struck off merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court is competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to law.*

[20] With respect, the cases cited by the learned High Court Judge are of no assistance as the instant appeal is clearly distinguishable from the former. In *PP v Heng You Nang* [1949] 1 LNS 61, the PP had appealed against the acquittal of the respondent on charges connected with the alleged importation of certain goods by the respondent. The appeal was dismissed. Subsequently, the DPP applied by motion that the court should hear further arguments and review its judgment. In *Ooi Sim Yim v PP* [1990] 1 CLJ 435; [1990] 1 CLJ Rep 223, the appellant had pleaded guilty to two charges, for possession of a firearm and ammunition. The trial judge sentenced the appellant to ten years' imprisonment and six strokes of whipping on the first charge and another three years on the second charge and ordered that 'both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest. About two and a half months after the disposal of the case, the trial judge issued a corrigenda to substitute the original order with a new one which had the effect of making both sentences to run consecutively, ie, the appellant was to serve a total of 13, years imprisonment to take effect from the date of his arrest. The approach taken by Petheram CJ in *Re Gibbons* and Spenser-Wilkinson J in *Heng You Nang* and Mohamed Azmi SCJ in *Ooi Sim Yim* was based on the rational that the cases were already heard on merits after taking into consideration the entire material on record. *This differs from our present scenario as the order dated 8 September 2016 could not be regarded as a 'judgment' or final order.*

RULING

[32] Therefore, having considered the matters as discussed above this court struck out the notice of motion due to the vast number of errors and mistakes contained in the notice of motion and also due to the fact that the affidavit in support was perplexing and confusing.

[33] Applications made praying the High Court to exercise its discretionary powers should be done diligently because it is by itself and application to cure a mistake or omission made previously by the applicant, which in this case being an application to reinstate and to extend time. This is as though person who commits a mistake and apologises repeats the mistake all over again.

Notice of motion struck out.

Reported by Ahmad Ismail Illman Mohd Razali